

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of

Docket No. 2008-0115

MOLOKAI PUBLIC UTILITIES,  
INC., WAI'OLA O MOLOKA'I, INC.,  
and MOSCO, INC.

For Temporary Rate Relief.

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COUNTY OF MAUI'S OPPOSITION TO MOTION TO MODIFY  
ORDER OF JUNE 23, 2008 DIRECTING MOLOKAI PROPERTIES,  
LTD. TO PARTICIPATE IN DOCKET NO. 2008-0115

CERTIFICATE OF SERVICE

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PUBLIC UTILITIES  
COMMISSION

DEPARTMENT OF THE CORPORATION COUNSEL

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COUNTY OF MAUI'S OPPOSITION TO MOTION TO MODIFY  
ORDER OF JUNE 23, 2008 DIRECTING MOLOKAI PROPERTIES,  
LTD. TO PARTICIPATE IN DOCKET NO. 2008-0115

COMES NOW COUNTY OF MAUI (hereafter, "County"), by and through its attorneys, BRIAN T. MOTO, Corporation Counsel, and JANE E. LOVELL, Deputy Corporation Counsel, and opposes the motion filed by Molokai Properties, Ltd. (hereafter, "MPL") to modify the Public Utilities Commission's (hereafter, "PUC") Order of June 23, 2008 directing MPL to participate in this docket, as follows:

I. INTRODUCTION

MPL's claim that the PUC does not have jurisdiction over it in this matter is based on two theories, neither of which is persuasive. The first is that MPL is not the owner of "the sewer company involved in the instant proceeding, Mosco." Motion to Modify Order of June 23, 2008 Directing Molokai Properties Ltd. to participate in Docket No. 2008-0115 ("MPL's Motion") at p. 2. MPL does not deny a relationship with Mosco, which it concedes is "owned by Kaluakoi Water LLC, which is owned in turn by Kauakoi Land, LLC, which is ultimately owned by MPL." MPL's Motion at p. 2. MPL also bases its motion on a claim that it is not bound by promises made to the PUC with respect to its subsidiary, Wai'ola O Moloka'i, Inc. MPL's Motion at p. 3.<sup>1</sup> MPL's theories are not persuasive. Whatever the chain of ownership between MPL and its utility subsidiaries, MPL has failed to establish that the PUC lacks jurisdiction.

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<sup>1</sup> MPL's motion does not address at all the third utility whose rates are at issue in this docket, Molokai Public Utilities, Inc.

It is appropriate in this case to "pierce corporate veil" by which MPL attempts to disassociate itself from its wholly-owned subsidiaries. In addition, MPL is estopped from denying that it benefitted from the representation made to the PUC by Wai'ola O Molokai, Inc., that "any losses it sustains in its operations will be covered by additional capital contributions from Molokai Ranch or by loans." In the Matter of the Application of WAI'OLA O MOLOKA'I, INC., Docket No. 7122, Decision and Order No. 12125 (hereafter, "D&O No. 12125.")

Therefore, MPL's motion should be denied.

## II. ARGUMENT

### A. Piercing The Corporate Veil Is Appropriate Because MPL's Utility Subsidiaries Were Undercapitalized

In Hawaii, undercapitalization is recognized as a ground for piercing the corporate veil. Kahili, Inc. v. Yamamoto, 54 Haw. 267, 506 P.2d 9 (1973). In Kahili, the Hawaii Supreme Court disregarded the corporate entity where two shareholders organized the corporation, owned all the shares of stock, and set the corporation up with only \$2,000 in working capital.

In Slottow v. American Cas. Co. of Reading, Pennsylvania, 10 F.3d 1355 (9<sup>th</sup> Cir. 1993), the Ninth Circuit Court of Appeals, applying California law, likewise noted that the corporate veil can be pierced if the corporation is undercapitalized. There, the court found that a trust company's initial capitalization of \$500,000 was "woefully inadequate for a corporation that handled trust agreements of the magnitude involved here." Id., 10 F.3d at 1360.

In D&O 12125, the PUC determined that Wai`ola O Moloka`i, Inc.'s initial capitalization consisted of water system assets formerly belonging to Molokai Ranch and \$1,000 in paid-in capital. D&O No. 12125 at p. 5. Wai`ola represented to the PUC that "any losses it sustains in its operations will be covered by additional capital contributions from Molokai ranch or by loans." Id. at p. 6. The PUC was also advised that "both Molokai Ranch and Wai`ola believe that current market conditions will not permit increasing the rates to the level necessary to provide a return on invested capital." Id. at p. 7. Until such time as rates could be raised, "Molokai Ranch will continue to fund Wai`ola's operations." Id. at p. 8.

Molokai Public Utilities, Inc. likewise started out with water system assets formerly belonging to Kalua Koi Corporation and only \$1,000 in working capital. In the Matter of the Application of MOLOKAI PUBLIC UTILITIES, INC., Docket No. 4112, Decision and Order No. 6834 at 2 (hereafter, "D&O 6834").

MPL appears to admit that Wai`ola O Moloka`i, Inc. was undercapitalized and dependant on MPL for operating capital. See MPL Motion at p. 3. MPL's argument that its promise to support Wai`ola was limited to "the near term" is disingenuous at best. MPL benefitted greatly from its development of residential and other properties for sale. That development depended on MPL's ability to provide water utility service for those properties. Had MPL told the PUC that Wai`ola O Moloka`i would only provide water for the "near term" and that thereafter, Wai`ola's customers would

be left high and dry, D&O No. 12125 would not have been issued, and MPL would not have been able to develop its property.

Undercapitalization alone would be a sufficient basis for disregarding the corporate form of MPL's utilities, and asserting jurisdiction over MPL in this docket. When one also considers the assurances given to the PUC and to the utilities' customers that MPL would provide the necessary financial backing, the record is even more clear. Under the circumstances, the PUC has appropriately asserted its jurisdiction over MPL.

**B. MPL Must Be Deemed Subject To The PUC's Jurisdiction To Prevent Fraud Or Injustice**

Although inadequate capitalization of a subsidiary may alone serve as the basis for holding the parent corporation liable for its subsidiary's debts, Slottow, supra, 10 F.3d at 1360, Hawaii law also recognizes prevention of a fraud or injustice as a sufficient reason to hold a parent corporation liable for the actions of its subsidiary. See Jou v. National Interstate Ins. Co. of Hawaii, 114 Hawai'i 122, 125 n.2, 157 P.3d 561, 564, n.2 (Hawai'i App. 2007) and cases cited therein; Kahili, supra, 54 Haw. at 271, 506 P.2d at 12 ("the recognition of the corporate fiction would bring about injustice and inequity.")

Here, MPL seeks to retain all of its valuable assets (including its valuable mountain water system, Wai Mau), while attempting to dump its liabilities on the taxpayers of the State or the County. Such a result would be neither equitable nor just. Therefore, the PUC should continue to assert its jurisdiction over MPL.

**C. Other Factors Support PUC's Assertion Of Jurisdiction Over MPL**

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In Slottow, supra, 10 F.3d 1355, the Ninth Circuit observed that the corporate form can be disregarded under variety of circumstances, including where there is a "unity of interest and ownership between the two corporations, and an inequitable result would follow if the corporations were treated as separate entitles." Id. Other factors considered by the Ninth Circuit were "the use of the same business location, the same lawyers, the failure to maintain arms' length transactions between the entities, [and] representations that the parent's assets will cover the subsidiary's debts." Id.; see, in addition, Morrissey, Daniel J., "Piercing All the Veils, Applying an Established Doctrine to A New Business Order", 32 J. Corp. L. 529, 544 (Spring 2007) (courts will consider undercapitalization, failure to observe corporate formalities, siphoning of corporate funds, corporate insolvency, or absence of corporate records; the significance of these criteria is lessened when the case presents an element of injustice or fundamental unfairness).

Here, MPL is the ultimate parent company of all of the utilities whose rates are at issue in this docket. MPL shares office space at 745 Fort Street in Honolulu with all three of the utilities. Wai`ola O Molokai received its certificate based on assurances that MPL would cover its debts. (See D&O 12125 at p. 6) The officers and directors of MPL are the same people who serve as officers and directors of the utilities. At least in the case of Molokai Public Utilities, Inc., the utility's employees were also

employed by one of that utility's parent companies. See D&O 6834 at p. 4. Moreover, MPL fails to observe corporate formalities in purporting to speak for the utilities. In its motion, MPL advised the PUC that "Mosco is not seeking and may not need a rate increase in this docket" and that "[i]f self-sustaining rates are awarded to MPU and Wai`ola, no change in the rates for Mosco will be required . . . ." MPL's Motion at pp. 2-3.

As for financial dealings between parent and subsidiaries and adherence to corporate formalities, the PUC should require MPL to produce records of its corporate minutes and resolutions, as well as the minutes and resolutions of the utilities, so that the PUC can determine whether the utilities have observed the proper corporate formalities and whether financial transactions between MPL and the utilities have been at arms' length.

**D. MPL Is Estopped From Arguing That The PUC Lacks Jurisdiction**

Under Hawaii law, a party cannot escape the consequences of its assurances to another when those assurances have been relied upon. The promise does not require consideration if the party making the promise intends that the other party rely on it, and the other party does in fact rely. If the promise is made by someone with apparent or ostensible authority to act for the corporation, that promise is binding on the corporation. Cosmopolitan Financial Corp. v. Runnels, 2 Haw. App. 33, 36-37, 625 P.2d 390, 394 (Haw. App. 1981).

When the PUC issued D&O No. 12125, it determined that the applicant had the financial means to fulfill its obligations to

provide water utility services. Under § 269-7.5(c), Hawai'i Revised Statutes, a certificate can only be issued if the PUC finds "that the applicant is fit, willing, and able properly to perform the service proposed . . . ." If the PUC does not make such a finding, the application must be denied. Id. The PUC made its determination based on the assurance by Wai'ola, a subsidiary of MPL, that "any losses it sustains in its operations will be covered by additional capital contributions from Molokai Ranch or by loans." D&O No. 12125 at p. 6. Because the PUC relied on that promise, MPL cannot now repudiate it, particularly where the record demonstrates that the applicant was acting with ostensible authority from MPL.


### III. CONCLUSION

Under the facts of this docket, and the legal authorities cited above, the PUC's jurisdiction over MPL is proper and necessary to avoid injustice. Therefore, MPL's motion should be denied.

DATED: Wailuku, Maui, Hawaii, July 29, 2008.

BRIAN T. MOTO  
Corporation Counsel  
Attorneys for COUNTY OF MAUI

By: \_\_\_\_\_

  
Jane E. Lovell  
Deputy Corporation Counsel



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CERTIFICATE OF SERVICE

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I hereby certify that on this date a copy of the foregoing document was served upon the following by First Class Mail, by depositing copies bearing sufficient postage with the U.S. Post Office, addressed as follows:

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Daniel Orodener, General Counsel and Secretary  
MOLOKAI PUBLIC UTILITIES, INC.  
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